UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
BOARD OF EDUCATION OF THE NORTH ROCKLAND CENTRAL SCHOOL DISTRICT,

Plaintiffs,

Case No. 7:16-cv- 3924
Hon. Vincent L. Briccetti

-against-

CM individually and o/b/o her child PG,

Defendants.
---X

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EMERGENCY PRELIMINARY INJUCTION AND TEMPORARY RESTRAINING ORDER

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I. PRELIMINARY STATEMENT

Defendants CM ("Parent") and PG ("Student"), Defendants in the action but Movants herein, seek a temporary restraining order and preliminary injunction during the pendency of appeal, based upon an Impartial Hearing Officer ("IHO") Order, by James McKeever, Esq. dated January 27, 2016, requiring the North Rockland Central School District ("Plaintiffs" or "District"). Defendants seek such injunction to force the District to fund PG's placement at the Whitney Academy during the 2016-2017 school year during the pendency of its appeal of IHO McKeever's well-reasoned Findings of Fact and Decision. The IHO ruled that the District failed to provide the Student with a free appropriate public education ("FAPE"), thereby violating his rights under the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Defendants can demonstrate: (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Without such relief requested, the 21-year-old Student, who carries diagnoses of Pervasive Developmental Disorder (NOS), Post Traumatic Stress Disorder, Chronic Reactive Attachment Disorder, an Intellectual Disability, ADHD, Generalized Anxiety Disorder NOS, Mood Disorder NOS, Learning Disorder NOS, Adjustment Disorder, Disruptive Behavioral Disorder and Oppositional Defiant Disorder and who is currently under probation, represents a danger to himself or others. The Whitney Academy, his current placement, provides individually tailored services for his intellectual disability and his sexual trauma.

Plaintiff has advised the Whitney Academy that it will not fund the Student's placement at the Whitney Academy for the upcoming 2016-2017 school year. The District has appealed the IHO's Section 504 determinations in the instant case, without legally sound basis. During the pendency of such ill-fated appeal, it is essential, for the Student's safety and public health and safety, that the Student remain at the Whitney Academy. A failure to grant such injunction shall cause irreparable harm to Student, as more fully set forth herein and in the annexed affidavits of Parent CM and Attorney Marion M. Walsh (Walsh Affidavit).

I. STATEMENT OF FACTS

Background

PG is a 20-year old young man classified as having an Intellectual Disability. IHO Findings of Fact and Decision at 6. [1]

Birth and Early Childhood History and Trauma

PG was born in Novosibirsk, Russia to alcoholic parents. PG lived in orphanages from age three to seven. He had no education, experienced deprivation, and was physically and sexually abused and gang raped. This early deprivation and trauma irrevocably affected PG's development. IHO Findings of Fact and Decision at 7.

The Parent and her now-deceased former husband adopted PG when he was 8 years old in or about April 2003; he was malnourished and described as feral. Dr. Boris Gindis, Ph.D. diagnosed PG with prenatal hypotrophy, perinatal encephalopathy, delay in psychological development and disarthia. IHO Findings of Fact and Decision at 7-8.

Early Educational History

PG was enrolled in the District on May 9, 2003. IHO Findings of Fact and Decision at 8. PG entered first grade at the Stony Point Elementary School in the District in May 2003 and the District placed him in general education classes, with English as a Second Language ("ESL") services. IHO Findings of Fact and Decision at 8.

[1] Facts herein reference the well-reasoned Findings of Fact and Decision of Impartial Hearing Officer James McKeever, Esq. dated January 27, 2016, attached as Exhibit C to the Affirmation of Marion Walsh, Esq.

2003-2005 School Year

The District did not refer PG for services until October 8, 2004. IHO Findings of Fact and Decision at 8. At a Committee on Special Education ("CSE") on December 16, 2004, the District classified PG as a Student with an Other Health Impairment ("OHI"). The CSE only recommended consultant teacher services for ELA and math, with Modified Curriculum and the support of a Behavior Intervention Plan. IHO Findings of Fact and Decision at 9.

2005-2006 School Year

In April 2005, the CSE placed PG in a self-contained 15:1 class for all of his academic subjects for the third grade. IHO Findings of Fact and Decision at 10. His teacher did not present any evidence of the profile or cognitive abilities of the class. Despite a "significant expressive and receptive language delay", the CSE did not recommend any speech and language services.

2006-2007 School Year

In April 2006, the CSE recommended that PG continue with the identical program and service model with the addition of a self-contained reading class. IHO Findings of Fact and Decision at 10. The District performed no standardized testing, and recommended no speech and language services, even though the IEP continues to state "Further assessment of his language skills may be warranted as English becomes his dominant language."

2007-2008 School Year

In March 2007, the CSE developed an IEP for the Student's fifth grade year. The CSE reported he was still on a "primer" level in reading. IHO Findings of Fact and Decision at 10. In September 2007, PG entered the fifth grade at Farley Middle School and only made "Some progress." IHO Findings of Fact and Decision at 11.

The CSE conducted a reevaluation in February 2008, more than three years after initial evaluations, in violation of mandated timelines. The reevaluation showed extremely low scores. These tests did utilize PG's reported birth date of April 13, 1995. IHO Findings of Fact and Decision at 11.

2008-2009 School Year

The IEP developed on March 10, 2008 details PG's significant needs and cognitive functioning in the extremely low range. Although it was noted that the Student struggled, there was no significant change in the Student's program. Although the IEP noted that the Student was often resistant and ran away and hid, there was no behavioral plan developed and counseling services remained the same. The CSE failed to conduct a speech language evaluation and failed to recommend speech and language services. IHO Findings of Fact and Decision at 12.

At PG's Annual Review CSE on June 17, 2008, the CSE placed PG at BOCES at Haverstraw Middle School for the following year, (2008-2009) in an 8:1+1 program for students with emotional and behavioral difficulties, due to his difficulty staying regulated even in a special education setting. The Student was still reading on a primer level and had significant deficits. The District did not offer speech language services despite his continued deficits. IHO Findings of Fact and Decision at 14.

In January 2009, the District amended the IEP to move the Student back to fifth grade. A 90 Day Review following his transfer to the program at Haverstraw relates concerns of avoidance of work and elopement from the classroom as he had eloped from the classroom 10 to 20 times a day. IHO Findings of Fact and Decision at 14.

On March 25, 2009, when the Student was twelve years old and attending the fifth grade for the second time, BOCES finally conducted a speech language evaluation. IHO Findings of Fact and Decision at 16.

Dangerous Behavior and Hospitalization

In or about April 2009, PG lacerated his buttocks jumping out of a window. He was hospitalized for thirty-three days at the Rockland Children's Psychiatric Center. IHO Findings of Fact and Decision at 15. During this hospitalization, an extensive Neuropsychological Evaluation was administered and provided to the District. This evaluation confirmed PG's recorded birthdate of April 13, 1995 and his diagnoses of Pervasive Development Disorder, NOS; ADHD, Combined type; and Mild Mental Retardation, among others. The evaluator opined that the Student needed a small, structured classroom and required speech language services. IHO Findings of Fact and Decision at 15.

2009-2010 School Year

The District held CSE meetings on April 20, 2009 and May 18, 2009-- immediately after the hospitalization and only recommended the addition of a 1:1 paraprofessional to assist PG. The District finally added speech language services to the IEP. IHO Findings of Fact and Decision at 15.

In November 2009, PG demonstrated continuing behavioral difficulties in school as well as an October 2009 arrest for breaking and entering. In November 2009, BOCES issued a progress report and noted he was regressing in his placement. IHO Findings of Fact and Decision at 16. The CSE recommended placement in an 8:1:1 class with a 1:1 paraprofessional for behavioral and academic support at the Rockland BOCES Hilltop School. PG participated in the general education curriculum including all assessments. He was nearly 15 years old but working on a third grade academic level. Yet his IEP continued to state he was making progress. IHO Findings of Fact and Decision at 16. A Functional Behavioral Assessment/ Behavioral Support Plan Worksheet from April 30, 2010 targeted PG's elopement behavior. IHO Findings of Fact and Decision at 16.

At the CSE meeting on May 3, 2010, the CSE recommended that PG remain in his current program. He was already 15-years-old, but had no transition planning or goals on his IEP. IHO Findings of Fact and Decision at 16.

Progress reports continued to indicate that PG had either achieved his goals or was "progressing satisfactorily." The District reported that PG had "transitioned well to the new program". Yet PG was suspended for "assault" on August 10, 2010 and continued to require individual educational instruction. IHO Findings of Fact and Decision at 17.

2010-2011 School Year

A 2009-2010 Counseling Summary and Academic Report stated that PG was reading novels such as "Tom Sawyer" and "The Prince and the Pauper" and short stories by T.S. Elliot and E.B. White. IHO Findings of Fact and Decision at 17. Yet a "G-RADE" assessment dated October 7, 2010 indicated that he was only performing at the 2nd percentile in reading. IHO Findings of Fact and Decision at 18.

The District failed to conduct a classroom observation to confirm whether the placement was meeting PG's needs. IHO Findings of Fact and Decision at 18. A Psycho-Educational Re-Evaluation Report, dated March 22, 2011, indicates that PG scored in the extremely low range cognitively, on the WISC-IV, and adaptively, on the ABAS-II, both at home and at school. Additionally, his BASC-2 scores indicated that he had a significant number of scores in both the at-risk and clinically significant ranges, by teacher, Parent and Student reports. Updated academic testing with the WJ III showed most standard scores in the very low range. IHO Findings of Fact and Decision at 18. In April 2011, an anonymous witness documented severe bullying against PG. IHO Findings of Fact and Decision at 18.

2011-2012 School Year

On May 11, 2011, the Parent made a written request for an emergency CSE meeting. By letter dated May 23, 2011, Judith Myerson, the Student's psychologist recommended that the Student be placed in a residential setting and opined that the bullying incidents at school exacerbated the Student's anxiety, PTSD and dysregulation. IHO Findings of Fact and Decision at 19.

After the CSE meeting, in June 2011 the Parent provided a psychiatric evaluation by Dr. Hall which noted that the Student had evidenced severe symptoms of impulsivity, and hyperactivity. His diagnostic impressions included Reactive Attachment Disorder, PTSD, ADHD and an Anxiety Disorder. Dr. Hall recommended a residential placement. IHO Findings of Fact and Decision at 20.

By letter dated June 21, 2011, the Stony Point Police Department Youth Bureau also warned that PG is an "at risk youth, who should be under 24-hour supervision". IHO Findings of Fact and Decision at 20. On January 26, 2012, Ms. Myerson conducted a Psychosocial History/Assessment and again opined that the Student required a residential setting. IHO Findings of Fact and Decision at 20.

2012-2013 School Year

A CSE convened on February 9, 2012. Ms. Myerson attended the meeting and advised the CSE that PG required a residential placement. She advised that the CSE's recommendation for a placement at the BOCES Riverview High School was not appropriate. The Parent again requested a residential placement. Ms. Heaney testified that she did not recall a discussion about a residential placement. IHO Findings of Fact and Decision at 20-21.

In the Spring of 2012, the Student's adoptive father passed away and PG spiraled out of control. PG had eloped a few times in or about 2012, creating situations that put him in great danger. PG displayed deeply concerning inappropriate sexual feelings toward his Parent. IHO Findings of Fact and Decision at 21.

The Parent called the District several times to discuss the Student's status but no one returned her calls. IHO Findings of Fact and Decision at 21. In or about September 2012, the Parent had no choice but to place PG at the Stokum Group Home with New York Foundling, located in New City in Clarkstown, through Office of People with Developmental Disabilities (hereinafter "OPWDD"). IHO Findings of Fact and Decision at 22.

2013-2014 School Year

While in the Clarkstown CSD, PG continued his steady and predictable decline, without appropriate supports. On January 13, 2014, PG eloped from the bus stop in an attempt to avoid going back to school. IHO Findings of Fact and Decision at 22. He was incarcerated for entering a neighbor's house and then for violating his parole.

Judge Apotheker, overseeing the Student's incarceration, recommended that the Student attend a therapeutic residential facility. IHO Findings of Fact and Decision at 22. In November 2014, the Parent filed a due process complaint against the Clarkstown Central School District ("Clarkstown"). IHO Findings of Fact and Decision at 22.

Placement at Whitney

In February 2015, Clarkstown placed the Student at the Whitney Academy, a therapeutic residential program that services students with developmental disabilities and sexual behavioral problems. The Student has adjusted well to the Whitney Academcy and has obtained an educational benefit since his placement. IHO Findings of Fact and Decision at 22. The school specializes in the treatment of dually diagnosed (developmentally delayed and psychiatrically disordered) young men, ages ten to twenty-two. Staff are trained to address the effects of severe trauma. The program provides a 3:1 staff to student ratio.

A. **The IHO's Decision Regarding Defendant's Section 504 Claims**

Based on the foregoing, the IHO properly found that under Section 504, the District violated the Student's rights by acting with "bad faith and gross misjudgment," and he is entitled to compensatory education. The IHO carefully considered his Section 504 ruling and, upon examination, it will stand as entitled to deference. In order to establish a Section 504 violation in the context of a school district's obligation to provide a FAPE to a student with disabilities, a Plaintiff must show that the defendant school district acted with "bad faith or gross misjudgment". *Pinn v. Harrison Central School District*, 473 F. Supp. 2d 477, 483 (S.D.N.Y. 2007) (hereinafter "*Pinn*"); c*f.*, *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282 (S.D.N.Y. 2010) (hereinafter "*Maus*"). The IHO concluded that the Defendant's inaction from January 2012 through June 2012 denied the Student a FAPE under Section 504 by failing to provide him with a residential placement. IHO Decision at 31. In support of his determination, the IHO found the Defendant was aware, as early as 2004, that the Student required a "small structured setting" with "intensive one-to-one teaching" for reading writing and math, and that the overall record failed to establish that the Defendant ever provided the Student with the level of support he required. IHO Decision at 31. The IHO noted that the Student's psychiatrist and psychologist both recommended a residential placement for the Student "not only to obtain and educational benefit, but in order to keep him safe (DExhs. 9, 33, PExh. H)." IHO Decision at

31. The IHO further noted that the District was aware of, but failed to investigate, the Parent's and Student's claims of bullying and failure to make progress at BOCES Hilltop, and further failed to observe the Student at BOCES Hilltop to ensure that it was an appropriate placement for him. IHO Decision at 32. Thus, the IHO ordered the Defendant to fund the Student's placement for an additional year at the Whitney Academy as an equitable remedy for the Defendant's Section 504 violations.

B. **The SROs Decision on Regarding Section 504 Claims**

On appeal, the New York State Review Officer (SRO) appropriately determined that it lacked jurisdiction to review the IHO's Findings of Fact and Decisions regarding Section 504 claims. SRO Decision at 11-12. Indeed, it is well established in New York State Education Law that an "SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart". *See A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 n.17 (E.D.N.Y. 2012); *see also D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 507 (S.D.N.Y. 2013) (hereinafter "D.C."); Educ. Law § 4402 (2) (providing that an SRO may only review IHO decisions which relate "to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"; *Application of a Student Suspected of Having a Disability*, Appeal No. 15-105 (December 2, 2015) (In New York, the jurisdiction of an SRO is limited to matters arising under the IDEA and Article 89 of the Education Law). "New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims". *Application of a Student with a Disability*, Appeal No. 14-179 (March 26, 2015); *Application of a Student with a Disability*, Appeal No. 13-047 (April 10, 2015); *Application of a Student Suspected of Having a Disability*, Appeal No. 15-104 (December 2, 2015) (State Review Officer does not have jurisdiction to review claims brought under section 504); *Application of a Student with a Disability*, Appeal No. 15-117 (January 19, 2016) (New York State law does not provide for review of Section 504 claims through the SRO appeal process authorized by the IDEA and the Education Law). As such, the SRO appropriately recognized that it had no jurisdiction to review any portion of the claim or the IHO's finding regarding section 504. *See A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d at 672 n.17; *D.C.*, 950 F. Supp. 2d at 507; *Application of a Student Suspected of Having a Disability*, Appeal No. 15-104 (December 2, 2015).

III.

LEGAL ARGUMENT

THE COURT MUST GRANT A PRELIMINARY INJUNCTION

The standard for issuing a temporary restraining order and a preliminary injunction are identical. *Harris v. Diaz*, 2004 U.S. Dist. LEXIS 25256, *9 (S.D.N.Y. Dec. 13, 2004) (hereinafter "*Harris*"); *Roberts v. Atl. Recording Corp.*, 892 F. Supp. 83, 86 (S.D.N.Y. 1995). "The general standard for issuing a preliminary injunction requires that the movant (herein Defendants) show: (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Harris*, 2004 U.S. Dist. LEXIS 25256 at *9; *Gold v. Feinberg*, 101 F.3d 796, 800 (2d Cir. 1996).

The District Court's decision in *Cosgrove v. Bd. of Educ.* Controls whether a court should enjoin a school district from ceasing to provide previously awarded equitable relief beyond a student's twenty-first birthday during the appeal process. *Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375 (N.D.N.Y. 2001) (hereinafter "*Cosgrove*"). In *Cosgrove*, the Plaintiffs requested an

Impartial Hearing based upon the Defendant Board of Education's failure to provide their son with a Free Appropriate Public Education (hereinafter "FAPE"). *Cosgrove*, 175 F. Supp. 2d at 379. The IHO found that the Board of Education failed to provide the student with a FAPE and ordered an additional two years of schooling at the Perkins School as compensatory education. *Id.* The Board of Education appealed the IHO's decision to the State Review Officer (hereinafter "SRO") and advised the Plaintiff parents that because the student turned 21 years old, pendency did not apply during the appeal process. *Id*. Plaintiff parents then commenced an action in the United States District Court for the Northern District of New York, seeking a preliminary injunction enjoining the Defendants from suspending the awarded compensatory education during the appeals process, as well as attorneys' fees and related relief. *Id*. at 379-80. In their Complaint, Plaintiffs alleged violations of the student's rights pursuant to the Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. §§ 1400-1490; the Civil Rights Act, 42 U.S.C. § 1983; The Americans with Disabilities Act (hereinafter "ADA"), 42 U.S.C. § 12132, Section 504; and Article 89 of the New York State Education Law. *Id*. at 380.

The *Cosgrove* Court determined that the issue turned "on whether the award of compensatory education to [the student] operates as an extension of the IDEA in certain limited circumstances, or whether, such an award is a completely separate and distinct operation of law relying on, but not part of, the IDEA." *Cosgrove*, 175 F. Supp. 2d at 387. The Court recognized that where there has been a gross violation of the IDEA, an award of compensatory education which extends beyond a student's twenty-first birthday is an available equitable remedy and one which may be appropriate. *Id*. (*citing Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 151 (N.D.N.Y. 1997)); *Butler v. South Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 419 (N.D.N.Y. 2000)) to make up for earlier deprivations. *Id*. at 387.

"Ordinarily, it would make sense to use the 'stay-put' provision as a guide to craft a suitable remedy" where a preliminary injunction is warranted. *M.W. v. N.Y. City Dep't of Educ.*, 2015 U.S. Dist. LEXIS 112832 at 15 (S.D.N.Y. August 25, 2015) (hereinafter "*M.W.*"). In *Cosgrove*, the district court applied the traditional test for deciding whether or not to impose a preliminary injunction which seeks to maintain the *status quo*, specifically, "a party seeking a preliminary injunction must demonstrate '(1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions gong to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief.'" *Cosgrove*, 175 F. Supp. 2d at 391-92; *quoting N.A.A.C.P., Inc. v. Town of East Have*, 70 F.3d 219, 223 (2d Cir. 1995). In the instant case, PG is entitled to a preliminary injunction preventing the Defendant from terminating funding for PG's placement at the Whitney Academy for the 2016-2017 school year during the on-going appeal process.

A. Early Discharge From The Whitney Academy Causes Irreparable Harm

The law has established that the "wrongful discontinuation of a special education program to which a student is entitled subjects that student to actual irreparable harm". *Cosgrove*, 175 F. Supp. 2d at 392-393. The court continued that, when the continuum of education is disrupted, significant set backs can result, making any future compensatory award nothing more than a "pyrrhic victory". *Cosgrove*, 175 F. Supp. 2d at 393.

In the instant case, on January 27, 2016, the IHO ordered that the Defendant "shall fund the Student's placement at the Whitney Academy for one additional year as remedy for violating the Student's rights under Section 504." IHO Decision at 33. PG was born on April 13, 1995 and turned 21 prior to the implementation of the IHO's order. As discussed, *supra*, a school district need not provide special education services to a student beyond the age of 21. *See Mrs.*

C. v. Wheaton, 916 F.2d 69, 76 (2d Cir. 1990) (hereinafter "*Wheaton*"). However, any discontinuance of PG's placement, as ordered by the IHO for the upcoming 2016-2017 school year, will cause significant set backs irreparable harm.

Whitney Academy staff members, who are presently treating the Student, have expressed grave concerns about the Student's premature discharge from the Whitney Academy should the Defendant cease to fund his placement for the 2016-2017 school year. Walsh Affirmation, ¶ 26-29, Exhibit E. Staff stated that the Student is not yet clinically ready for discharge. He continues to struggle with symptoms of severe PTSD, significantly dysfunctional attachment patterns and poor impulse control. *Id.* Following a visit to his Parent's home in or about December 2014, the Student became depressed, dissociative, anxious, dysregulated and suspicious. Walsh Affidavit, Exhibit E. As such, the Student requires the additional year of placement at the Whitney Academy awarded by the IHO to obtain the comprehensive treatment and instruction on how to function in the community when he is eventually discharged. Without this additional year, the Student will not be able to function appropriately or safely in the community. Harm that comes to the Student or others as a result of the Student's early discharge will be irreparable, even with additional compensatory services.

B. Defendants Can Demonstrate Likelihood of Success On The Merits Of Their Claims

At the Impartial Hearing, the IHO found sufficient facts to demonstrate bad faith or gross misjudgment as to the Student's educational needs, including but not limited to:

- Ignoring parental concerns and complaints about bullying
- Not observing the Student at BOCES Hilltop or monitoring the environment as to whether it was supportive and not monitoring bullying behavior of Ms. Taylor; (Hilltop described as very therapeutic and supportive)
- Being adverse and antagonistic toward the Parent;
- Overstating the Student's progress;
- Not explaining the CSE's obligation to consider a residential placement;

- Being deliberately indifferent to the student's global, severe needs and characterizing them only as "at home."
- Telling the Parent there was nothing she could do and not sending her procedural safeguards each and every year.   .

In addressing the Section 504 claim, the IHO relied upon *Maus,* 688 F. Supp. 2d 282 and *Pinn*, 473 F. Supp. 2d 477, for the standard that "[i]n order to show a violation of Section 504 in the context of providing an education to a child with disabilities, plaintiffs must show that a school district acted with 'bad faith or gross misjudgment'". IHO Decision at 31, *citing Pinn*, 473 F. Supp. 2d at 483 and *Maus*, 688 F. Supp. 2d 282. The IHO then relied on the entirety of the record in general in support for his determination that the District acted with gross misjudgment regarding PG's education. Specifically, the IHO explained:

> As indicated above, the District [k]new, as far back as 2004, that the Student required a 'small structured setting,' with 'intensive one-to-one teaching . . .' for reading writing and math (Exhibit E), yet there was no evidence that this level of support was ever provided to the Student (See record generally). The District was also aware that the Student was treated by Dr. Hall, a psychiatrist, and Ms. Myerson, psychologist, both of whom strongly opined that the Student required a residential placement, not only to obtain an educational benefit, but in order to keep him safe (Exhibit 33, Exhibit H, Exhibit 9). Additionally, the District was also aware of the parent's concerns about bullying at BOCES Hilltop and about his failure to obtain an educational benefit from this placement. Although the record does not conclusively support a finding that the bullying actually occurred, the evidence shows that the District was aware of the allegation and failed to investigate. The District was also aware of the parent's concerns that the Student was not making progress at BOCES Hilltop, and there is no objective evidence to support the District's assertions to the contrary. Finally it must be noted th[at] despite being on notice of the above concerns, District also failed to observe the Student at the BOCES Hilltop to confirm whether the placement was meeting the Student's needs. *Accordingly, for these reason, I find the District's failure to remove the Student from BOCES Hilltop between January and June of 2012 was a 'gross misjudgment' and resulted in a violation of the Student's rights under Section 504.*

IHO Decision at 31-32 (emphasis added). The IHO ultimately awarded compensatory education of funding for an additional year at the Whitney School as an equitable remedy. IHO Decision at 32-33. On appeal, the SRO appropriately held that it did not have jurisdiction to review the IHO's findings with respect to the Parent's and Student's Section 504 claims. SRO Decision at

12. As such, the Defendants have already succeeded on the merits at the administrative level and, based on applicable legal standards, shall do so on appeal.

1. The IHO and SRO Decision are Entitled to Deference

Defendants can demonstrate likelihood of success on the merits, as the IHO decision, and SRO's deferral to the IHO, is entitled to deference. The existing standard of review will permit the Court to conduct, to a substantial point, a *de novo* review of the record. This Court recently reexamined the standard for federal review of SRO and IHO decisions:

> The standard of review on such an appeal is somewhat Janus-like. On the one hand, the IDEA requires this Court to "conduct[ ] an 'independent review of the administrative record' and ... make[ ] a determination based on a 'preponderance of the evidence.'" *W.M. v. Lakeland Cent. Sch. Dist.*, 783 F. Supp. 2d 497, 504 (S.D.N.Y. 2011) (*quoting Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007)). On the other hand, the Supreme Court has held that such a review is "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

B.R. ex rel. K.O. v. New York City Dept. of Educ., 910 F. Supp. 2d 670, 675 (S.D.N.Y. 2012) (hereinafter "K.O."). As the Second Circuit noted, "the deference owed to an SRO's decision depends on the quality of that opinion," *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 189 (2d Cir. 2012), or its "persuasiveness." *M.H. v. N.Y.C. Dep't of Educ.* (M.H. II), 685 F.3d 217, 244 (2d Cir. 2012). *See C.L. & S.B. v. New York City Dep't of Educ.*, 12 Civ. 1676, 2013 U.S. Dist. LEXIS 3474 (S.D.N.Y. 2013). The Court of Appeals has also explained that "federal courts reviewing administrative decisions must give 'due weight' to these proceedings, mindful that the judiciary generally 'lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 *(quoting Rowley*, 458 U.S. at 206, 208); *see also Cerra v. Pawling*

Cent. Sch. Dist., 427 F.3d 186, 191 (2d Cir. 2005). Deference to the decision in the administrative record is particularly appropriate when the administrative officer's review has been thorough and careful, and when the court's decision is based solely on the administrative record. *See Walczak v. Florida Union Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998); *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 367 (2d Cir. 2006).

The Second Circuit has clarified. *See M.H. v. N.Y.C. Dep't of Educ.* (M.H. II), 685 F.3d 217 (2d Cir. 2012). The court should give substantial deference to the SRO's views of educational policy, but, perhaps, less to the SRO's factual findings or to its reasoning in general. *Id.* at 241. In the case at hand, the SRO's decision to decline review of Section 504 claims, is entitled to deference. The Court must determine whether the SRO's decision is "well-reasoned, and whether it was based on substantially greater familiarity with the evidence and the witnesses than the reviewing court." *Id.* at 244 (*citing Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086-87 (1st Cir. 1993)); *see also R.E.*, 694 F.3d 167, 2012 WL 4125833 ("[A] court must defer to the SRO's decision on matters requiring educational expertise unless it concludes that the decision was inadequately reasoned, in which case a better-reasoned IHO opinion may be considered instead."). *K.O.*, 910 F. Supp. 2d 670. Here, the decisions stand in agreement and the Court must defer to the expertise of the administrative bodies.

Implicit in this analysis rests a deference to well-reasoned decisions and reviewing judges who possess familiarity with the evidence and witnesses. The IHO in this case heard from witnesses in the case, including District representatives and the Parent, in a hearing that lasted a year, and determined, based upon the credibility of the witnesses and his direct review of the facts, the appropriate relief. In this case, the IHO's Decision is based upon a thorough review of the record, is well-reasoned and contains appropriate legal and factual support through citations to the record. The IHO based his decision on a thoughtful analysis of the student's needs and her judgments of credibility of the witnesses in the hearing.

The SRO appropriately declined to review the Section 504 determination and appropriately bifurcated the Decision. For the reasons stated below, under the applicable examination, plaintiff maintains that the IHO and SRO decision are entitled to deference and must stand.

2. Plaintiffs' Attempt to Mix Up IDEA and Section 504 Claims Must Fail

In its Complaint, Plaintiffs allege that the Defendants' claims mirror the IDEA claims and should be dismissed based on the IDEA statute of limitations. Such claims have no merit as the IHO appropriately and clearly bifurcated such claims and ruled that the Plaintiffs violated Section 504. The IHO Decision contains over 20 pages of findings of fact to support a finding of a gross denial of FAPE and appropriately found that the Section 504 Claim was not time-barred. IHO Findings of Fact and Decision at 4-22, 31-32.

3. Plaintiff's Appeal to Federal Court is Inappropriate

In any event, the Plaintiff's appeal to federal court is inappropriate and untimely. The IHO rendered a Decision on January 27, 2016. Plaintiff then appealed the Section 504 Claim to the New York Office of State Review, which did not have jurisdiction. Plaintiffs, represented by experienced counsel, made such appeal to the SRO, even with knowledge that the SRO does not have jurisdiction to hear such claim. Moreover, some federal courts have indeed questioned whether a federal court even has jurisdiction to review a Section 504 claim. *See, e.g., J.D. v. Georgetown Indep. Sch. Dist.*, 57 IDELR ¶ 36 (W.D. Tex. 2011); *cf. Bd. of Educ. of Howard Cnty. v. Smith*, 2005 U.S. Dist. LEXIS 6722 (D. Md. Apr. 20, 2005) (ruling that district lacked standing to appeal an IHO's decision under Section 504).

In any event, numerous bases exist for the IHO decision to stand and the Plaintiff's questionable basis for appeal and the substantial deference given to the administrative only weigh in favor of Defendant's likelihood of success on the merits.

4. Provision of Compensatory Education as Equitable Relief Was Appropriate

The IHO's decision on equitable relief weights in favor of the granting of the preliminary injunction, which is an equitable remedy. An IHO has the equitable power to award compensatory education for the gross violation of Section 504 and the IDEA. Within the Second Circuit, compensatory education may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time. *Somoza v. New York City Dep't of Educ*., 538 F.3d 106, 109 n.2, 113 n.6 (2d Cir. 2008) (hereinafter "*Somoza*"); *Wheaton,* 916 F.2d 69. Compensatory education can be in the form of a private school placement. *Draper v. Atlanta Indep. Sch. Sys.,* 518 F.3d 1275, 1284 (11th Cir. 2008). As an equitable remedy, the IHO in the instant matter exercised his discretion to award compensatory services in a form appropriate for the Student to wit, an additional year at the Whitney Academy, which is uniquely suited for the Student and where he is making progress.

The accumulated evidence and testimony, buttressed through case law, strongly supported this equitable relief. There is no doubt of the deprivation of FAPE and that the Student regressed in the District. His reading and math levels never improved beyond third grade and, more significantly, his behavior decompensated. The Defendant blatantly ignored the Psychological and Psychiatric Reports that the Parent provided. Given the denial of FAPE over a long period of time, due to the lack of understanding of the Student's needs, the IHO determination that the Student required one additional year of a residential program at the

Whitney Academy was reasonable. Indeed, the Student's therapist noted at the Impartial Hearing,

> …He did not receive the adequate education in his elementary, middle and high school years. He needs work. And my hope is that this will help him,… I think he's still a pretty high risk kid and anything that we can do to give him what he needs is needed here. … I've worked with a number of districts on kids and in my experience usually the district looks at the global picture of what is happening with the child and not only what is happening at that moment in the classroom in terms of his functioning and that's my understanding of it…this was a situation where I feel like people should have paid attention more.

Transcript of Impartial Hearing at 973.

5. Provision of Compensatory Education Beyond Age 21 not Available without Order

The Court must understand that, absent a granting of the preliminary injunction and enforcement of the IHO Order for compensatory education, the student, who was inappropriate served by the District for a long period of time, will receive no services. A school district need not provide special education services to a student beyond the age of 21. *See Wheaton*, 916 F.2d at 76 ("Generally, under the IDEA, 'a disabled child does not have a right to demand a public education beyond the age of twenty-one'"). However, a student who is over the age of twenty-one may still receive compensatory education, which is "prospective equitable relief . . . as a remedy for any earlier deprivations in the [student's] education" which amount to "gross violations of the IDEA." *K.H. v. New York City Dep't of Educ.*, 2014 U.S. Dist. LEXIS 108393 (E.D.N.Y. Aug. 6, 2014) (*quoting Somoza*, 538 F.3d at 109, n.2). In *Burr*, the Second Circuit held that "in some circumstances" a district court may award compensatory education as an equitable remedy beyond the age of 21. *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated Sobol v. Burr*, 492 U.S. 902 (1989), *re-aff'd. Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), *cert. den. Sobol v. Burr*, 494 U.S. 1005 (1990); *see also Cosgrove*, 175 F. Supp. 2d at 388. Indeed, "federal courts may use any available remedy to make good the wrong done" and "equitable considerations are relevant in fashioning relief". *Burr*, 863 F.2d 1071 at 1078 (*quoting School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985)); *Cosgrove*, 175 F. Supp. 2d 375.

6. IHO Appropriately Ruled on Section 504

The IHO appropriate ruled that the District violated the Student's Section 504 rights and denied him a FAPE by failing to provide an appropriate residential placement and appropriate support and services. Pursuant to Section 504 Regulations, if a public or private placement is necessary to provide a FAPE to a student with a disability, a school district must provide the placement, including non-medical care and room and board, at no cost to the person or his or her parents or guardian. *See* 34 CFR §104.33 (c)(3). The egregious misunderstanding and neglect of the Student's needs amounts to a gross denial of FAPE for many years. The Parent sought reasonable relief--one year at Whitney for compensatory services, which, due to the Student's regression and continued safety risks, was appropriate and necessary.

Federal courts in New York have held that in order to show a violation of Section 504 in the context of providing an education to a child with disabilities, a petitioner must show that a school district acted with "bad faith or gross misjudgment." *Pinn* 473 F. Supp. 2d at 483; c*f.*, *Maus*, 688 F. Supp. 2d 282.

C. Balance Of Hardships Favors Defendants And Issuance Of A Preliminary Injunction Is Not Contrary To The Public Interest

In *M.W. v. N.Y. City Dep't of Educ.*, this Court stated that "[w]henever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief." *M.W.*, 2015 U.S. Dist. LEXIS

112832 at 14-15 (*citing Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 929 (2d Cir. 1997)). Where a school district's long term neglect causes a student to age out of special education services, "the public interest is best served by holding Defendants accountable beyond age 21. Otherwise, Defendants have an incentive to run out the clock." *Id*. at 15.

The *Cosgrove* court listed several factors "pertinent to this balancing test." *Id.* at 395. The court reasoned that, "Congress recognized, in enacting the IDEA, that there would be cost inherent in the implementation of its mandate. Indeed, federal funding is conditioned on compliance with the IDEA, 20 U.S.C. § 1412". The "lynchpin" of the balancing determination is "whether the mandate of the IDEA, which affords *all* students a *free appropriate public education*, has been fulfilled." *Cosgrove*, 175 F. Supp. 2d at 395 (emphasis in original).

The balance of hardships in the instant case is between (a) the resulting harm to the student if he is prematurely discharged from the Whitney Academy against the recommendation of his medical team and (b) the District being forced to pay for an additional year of the Whitney Academy, as awarded by the IHO as equitable relief for Defendant's failure to provide PG with a FAPE for the 2016-2017school year, with the possibility of not recovering the costs of that placement. The instant IHO determined that the Defendant failed to provide "that which it was obligated to provide, but failed to provide." IHO Decision at 32. He continued that "the evidence clearly shows that the District failed to meet [the] Student's academic and social/emotional needs and that the Student actually regressed in the placements recommended by the District."

Applying the *Cosgrove* analysis, PG suffered as a direct result of Defendant's failure to provide him with a FAPE for its failure to recommend a residential placement for the Student as of January 2012 and through June 2012, thus, PG is entitled to receive now what he should have previously received from the Defendant. *See Cosgrove*, 175 F. Supp. 2d at 395. "The logical conclusion is that if the school district had complied with the IDEA during the [time] the IHO found w[as] deficient, it would have incurred the same expenses then that it will incur now. In this sense, the District is the author of this chapter in [PG's] education so it can hardly be said that the balance tips in the District's favor." *Cosgrove*, 175 F. Supp. 2d at 395. As such, this Court should order that, during the pendency of Plaintiffs' appeal, the Defendant must place PG in the Whitney Academy for the upcoming 2016-2017 school year, up to June 30, 2017.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant the motion for a temporary restraining order and preliminary injunction.

Dated: June 21, 2016
White Plains, New York

Respectfully submitted,

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